

KAN. EXHIBIT 74
Kan. v. Neb & Colo. No. 126, Orig.
Arbitration Initiated 10/21/08



**MONTGOMERY
& ANDREWS**

JOHN B. DRAPER
Direct: (505) 986-2525
Email: jdraper@montand.com
Reply To: Santa Fe Office
www.montand.com

January 29, 2009

Via U.S. Mail and Email

Aaron M. Thompson
Area Manager
U.S. Bureau of Reclamation
203 West 2nd Street
Grand Island, NE 68801
athompson@gp.usbr.gov

**Re: Touhy Request for Documents and Information in the Interstate
Arbitration Initiated 10/21/08 Pursuant to Decree Entered May 19,
2003, *Kansas v. Nebraska & Colorado*, No. 126, Orig., U.S. Supreme
Court**

Dear Mr. Thompson:

The State of Kansas (Kansas) requests that you provide the documents and information specified below for purposes of the above-referenced arbitration (Arbitration). The hearing in the Arbitration is scheduled for March 9-20, 2009 in Denver, Colorado at the Denver University Law School before Arbitrator Karl J. Dreher.

Kansas will submit a check for costs to the Department of Interior (Department), in accordance with 43 CFR § 2.85, if this request is granted.

The requested information is expected to be helpful and relevant in resolving the current dispute among the States of Kansas, Nebraska and Colorado (States) regarding Nebraska's compliance with the Supreme Court Decree (Decree) of May 19, 2003 enforcing the Republican River Compact (Compact). The Decree is found

{00045664-1}

REPLY TO:

325 Paseo de Peralta
Santa Fe, New Mexico 87501
Telephone (505) 982-3873 • Fax (505) 982-4289

Post Office Box 2307
Santa Fe, New Mexico 87504-2307

6301 Indian School Road NE, Suite 400
Albuquerque, New Mexico 87110
Telephone (505) 884-4200 • Fax (505) 888-8929

Post Office Box 36210
Albuquerque, New Mexico 87176-6210

Aaron M. Thompson
January 29, 2009
Page 2

at 538 U.S. 720 (2003). The Final Settlement Stipulation (FSS), which is approved by the Decree, is found on the U.S. Supreme Court website at <http://www.supremecourtus.gov/SpecMastRpt/SpecMastRpt.html>.

The three States are the parties to the Arbitration. The U.S. Bureau of Reclamation (Reclamation) has projects in all three States. The United States appeared as an amicus curiae (friend of the Court) in the proceeding in the original jurisdiction of the United States Supreme Court, and, with significant input from Reclamation, was a full participant in the negotiations that resulted in the Decree. See Second Report of the Special Master (Subject: Final Settlement Stipulation), *Kansas v. Nebraska & Colorado*, No. 126, Orig., at 24-25 and App. E (2003) (also found at the U.S. Supreme Court website address cited above).

The information requested is not reasonably available from any other source. You, as Reclamation Area Manager, and Reclamation possess unique information on the matters at issue in this proceeding, including the viability and history of Reclamation's projects (Projects) that have facilities in the Republican River Basin in Nebraska (Basin) and the availability of surface water from those Projects to offset Nebraska's groundwater pumping depletions of the Republican River that would otherwise cause violations of the Decree (Depletions).

Because of Reclamation's central and unique role in the Basin, there is no record or set of records that can conveniently be provided and used in lieu of the documents and information requested.

Please provide the following information, and related documents, to the extent possible and to the extent not already addressed in your May 7, 2008 letter to Justin Lavene, Esq. (a copy of the letter is attached for reference):

1. The history of inflows to, and deliveries by, the Projects and the prospective viability of the Projects under current conditions and trends.
2. Reclamation reports on the Basin since 2002 and the current public draft of the Appraisal Study of Enders Reservoir.

Aaron M. Thompson
January 29, 2009
Page 3

3. A description of the Appraisal Study of Enders Reservoir and its current status.
4. Whether any short-term or long-term arrangement has been approved by Reclamation regarding transfer of Project water to offset Depletions and, if so, the terms and conditions thereof.
5. Whether Reclamation can guarantee that Project water can and will be made available in the future to offset Depletions, and if so, to what extent, under what conditions and over what time periods.
6. The contractual and procedural steps that have been, and would be, necessary to transfer Project water from current Project uses and lands for use elsewhere to offset Depletions.
7. The status of any Reclamation consideration of long-term or short-term transfers of Project water to offset Depletions.
8. Any concerns that Reclamation may have about the adequacy of the Nebraska Republican Basin Natural Resource Districts' (NRDs') Integrated Management Plans (IMPs).
9. All testimony provided by Reclamation to the NRDs since the beginning of 2005.
10. Any concerns that Reclamation may have regarding the effect of Depletions on Project inflows.
11. The major interests Reclamation has in the Basin that are protected by the Decree, the FSS and the Compact.
12. All correspondence between or among the State of Nebraska, the Districts, the NRDs and Reclamation related to purchase or transfer of Project water to offset Depletions.

Aaron M. Thompson
January 29, 2009
Page 4

13. Contracts with the Districts, including current contracts and any amendments to facilitate transfers of Project water to offset Depletions.
14. All documents created or received in connection with consideration or approval of short-term or long-term transfers of Project water to offset Depletions.

I believe this request complies with 43 CFR § 2.88 because: (a) the information is not available from another source as explained above; (b) the information, to our knowledge, would not be inconsistent with any other federal statute or regulation; and (c) providing the information would be consistent with the Department's ability to:

- (1) Conduct its official business unimpeded: This request has been tailored to minimize as much as possible any interference with your schedule and official obligations;
- (2) Maintain impartiality in conducting the Department's business: The information requested is information about Reclamation's policies applicable to its Projects in the Basin for the benefit of water users in both Nebraska and Kansas;
- (3) Minimize the possibility that the Department will become involved in issues that are not related to its mission or programs: The Arbitration proceeding would appear to raise issues that are central to Reclamation's mission and programs in the Nebraska-Kansas Area of Reclamation's Great Plains Region, and the outcome of the Arbitration and subsequent proceedings is likely to affect the future viability of Reclamation's Projects;
- (4) Avoid spending public employee's time for private purposes: Providing the information will contribute to two high public purposes, namely, achieving compliance with a Supreme Court decree and an interstate compact and enhancing the viability of the Projects;

Aaron M. Thompson
January 29, 2009
Page 5

- (5) Avoid the negative cumulative effect of granting similar requests: Given the unique character of the present interstate proceeding, it is not expected that there will be many similar requests that would have an unwanted cumulative negative effect on the Department;
- (6) Insure that privileged or protected matters remain confidential: No privileged or protected information is requested; and
- (7) Avoid undue burden on the Department: This request has been tailored to minimize any impact on the Department.

Thank you very much for your consideration of this request.

Sincerely yours,



John B. Draper
Counsel for Kansas

JBD:dlo

cc: (by U.S. Mail and email)
John Chaffin, Esq., Solicitor's Office
Justin Lavene, Esq., Counsel for Nebraska
Pete Ampe, Esq., Counsel for Colorado



IN REPLY REFER TO:

NK-100
WTR-4.00 RR

United States Department of the Interior

BUREAU OF RECLAMATION
Great Plains Region
Nebraska-Kansas Area Office
P.O. Box 1607
Grand Island, Nebraska 68802-1607



MAY 07 2008

Mr. Justin D. Lavene
Assistant Attorney General
Office of the Attorney General
2115 State Capitol
Lincoln, NE 68509

Subject: Republican River Surface Water Purchases

Dear Mr. Lavene:

During our conversation at the last Republican River Compact Administration meeting, you asked for a copy of the contracting process for a long-term water agreement between Reclamation, Irrigation Districts, Republican River Natural Resources Districts (NRD's), and Nebraska Department of Natural Resources (DNR). Our January 10, 2008, letter to you concerning Republican River surface water purchases provided information relating to this process and authorities that may be available to allow the DNR and the NRD's to purchase Reclamation project water to aid in Compact compliance by the State of Nebraska. This information is intended to supplement the information previously provided.

It is difficult to provide a definitive answer to your request concerning what is the process for a long-term water agreement as we do not know any details of the proposed purchase or lease. Our Regional Office has developed a "Summary of Reclamation Process for General Contracting Actions" which is enclosed for your information and use. The process outlined in the Summary is general in nature and as such may include procedures and requirements that may not be required for a long-term agreement depending on specific provisions, such as term, amount of annual water purchase or lease, source, and proposed use of the water. Following is a discussion of some of the potential terms and conditions of a proposed purchase or lease that influence the processing requirements.

1. Any long-term agreement for Reclamation project water must begin with approval of the irrigation districts selling and impacted by the sale or lease of the project water. The specific provisions for the accounting and protection of the purchased or leased water are central to the approval requirements of the districts and Reclamation. The delivery, protection, and accounting of the purchased or leased water will not reduce or diminish the water supply or water use benefits of any downstream irrigation district that is not a party to this agreement and has not agreed to a reduction in water supply as a result of the agreement. It is Reclamation's understanding that the DNR will administer surface water under the prior appropriation system and the NRD's will regulate groundwater under a modified correlative right system.

2. If the long-term agreement is intended to be a contractual agreement that provides for DNR/NRD's to exercise annual option provisions for the purchase or lease of surface water, the

MAY 09 2008

KS DEPT OF AGRICULTURE

2

long-term agreement would need to identify the sources and uses planned for the purchased or leased water. This is needed for Reclamation to determine a basis and authority for the agreement, to allow for inclusion of irrigation districts associated with the contracting action, and to allow for the development of an appropriate environmental document. For instance, agreements limiting the use of purchased or leased water to that of irrigation of Reclamation project lands in Kansas has been previously accomplished with minimal time and costs involved in environmental clearance. Other planned uses, such as in-stream flow below Guide Rock, will require a more involved environmental evaluation. Please note it is a Reclamation requirement that the use planned for the purchased or leased water be a beneficial use under existing State statutes.

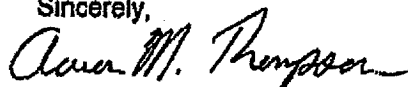
3. Any long-term agreement that involves the purchase of surface water for use in supplying additional water to Kansas will involve Harlan County Lake. The accounting, storage, and releases of water at Harlan County Lake require close coordination, consultation, and approval by the Corps of Engineers.

4. At this time, we believe that the term of a long-term agreement should not exceed five years. This would be consistent with a number of water management concepts in the Republican River basin that are also based on a five-year term. This is the base term established for Final Settlement Stipulation water use accounting in the basin, and it is also the term of the current revisions to the Integrated Management Plans recently adopted in the basin.

Reclamation believes the most likely available sources of supply of Reclamation project water to be purchased or leased on an annual basis under a long-term agreement are Harry Strunk Lake and Harlan County Lake. The upstream reservoirs simply do not currently have sufficient inflow to be a reliable source for planned, annual purchases under a long-term purchase agreement. Reclamation believes purchase or lease of Harlan County Lake storage water for release downstream will result in the need for additional reservoir inflow, prior to the next irrigation season, to avoid a subsequent "Water Short Year Administration" designation.

If you have any questions, or need additional information, please contact me at telephone 308-389-5300.

Sincerely,



Aaron M. Thompson
Area Manager

Enclosure

cc: Dick Wolfe, PE, State Engineer, State of Colorado, Division of Water Resources,
1313 Sherman Street, Suite 818, Denver, CO 80203
David Barfield, P.E., Chief Engineer, Division of Water Resources, Kansas Department of
Agriculture, 109 SW 9th Street, 2nd Floor, Topeka, KS 66612-1280
Brian P. Dunnigan, P.E., Acting Director, Nebraska Department of Natural Resources,
PO Box 94676, Lincoln, NE 68509-4676
Colonel Roger Wilson, Jr., Corps of Engineers, Kansas City District, 700 Federal Building,
Room 844, 601 East 12th Street, Kansas City, MO 64106
(Each with enclosure)

WATER RESOURCES
RECEIVED

MAY 09 2008

KS DEPT OF AGRICULTURE

**Summary of Reclamation Process for General Contracting Actions
Prepared by Great Plains Region**

1. Initiate Action
 - A. Contractor's Request – should identify issues
 - B. Review issues internally
 - (1) Water Rights
 - (2) Environmental Studies
 - (3) Field Office
 - (4) Solicitor
 - (5) Meet with Contractor – clarify issues
 - (6) Provide for notice in Federal register
2. Reclamation prepare internal documents
 - A. Review Authority
 - B. Review Delegations of Authority
 - C. Prepare request delegation of authority
 - D. Initiate National Environmental Policy Act, Endangered Species Act, Fish & Wildlife Coordination Act and National Historic Preservations Act
3. Preliminary Studies
 - A. Vary greatly depending on action.
 - B. New or renewal contracts may require
 - (1) Needs analysis
 - (2) Groundwater Studies
 - (3) Land Classification
4. Contract Negotiations
 - A. Following approval by Commissioner of Reclamation
 - B. Draft contract
 - C. Review internally including Field Solicitor
 - D. Submit draft contract to contractor before negotiation
 - E. Public Participation
 - (1) Federal Register Notice or include in the listing entitled "Quarterly Tabulation of Pending Contract Actions"
 - (2) Announce meeting in local press release at least a week in advance of Negotiations
 - (3) Provide copy of draft contract to interested parties requesting a copy
 - F. Prepare Meeting reports
 - G. Finalize draft contract

WATER RESOURCES
RECEIVED

MAY 09 2008

KS DEPT OF AGRICULTURE

5. Complete Environmental Review and Documentation
 - A. NEPA, ESA, FWCA and NHPA
 - B. Initiate environmental documentation as soon as possible
 - C. Determine what actions are needed and prepare analysis
 - D. If required, coordinate with Fish and Wildlife Service
 - E. Consult with State Historic Preservation Officer on NHPA
 - F. Complete environmental documentation
6. Contract Approval
 - A. Submit contract to contractor for approval
 - B. Announce availability of contract for public review and comment for a period of 60 days

WATER RESOURCES
RECEIVED

MAY 09 2008

KS DEPT OF AGRICULTURE

Message

Page 1 of 1

Donna Ormerod

From: John B. Draper
Sent: Thursday, January 29, 2009 1:28 PM
To: Aaron M. Thompson (athompson@gp.usbr.gov)
Cc: 'john.chaffin@sol.doi.gov'; Tom Wilmoth (tom.wilmoth@huschblackwell.com); Don Blankenau (Don.Blankenau@huschblackwell.com); 'Justin Lavene'; Peter Ampe; Powers, Marcus; Autumn Bernhardt; 'Speed, Samuel'; Burke Griggs (Burke.Griggs@kda.ks.gov); Chris Grunewald; Lee Rolfs (leland.rolfs@sbcglobal.net)
Subject: Letter requesting documents and information

Dear Mr. Thompson-

Please find attached Kansas' letter requesting certain documents and information.

John Draper

John B. Draper
Montgomery & Andrews, PA
P.O. Box 2307
Santa Fe, New Mexico 87504-2307
jdraper@montand.com
(505) 986-2525 (direct)
(505) 982-4289 (fax)

THIS COMMUNICATION MAY BE IN CONFIDENCE OR SUBJECT TO ATTORNEY-CLIENT PRIVILEGE OR MAY CONTAIN ATTORNEY WORK PRODUCT. UNLESS YOU ARE THE ADDRESSEE (OR AUTHORIZED TO RECEIVE FOR THE ADDRESSEE), YOU MAY NOT USE, COPY, OR DISCLOSE TO ANYONE THE COMMUNICATION OR ANY INFORMATION CONTAINED IN THE COMMUNICATION. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE ADVISE THE SEND BY REPLY E-MAIL TO jdraper@montand.com, AND DELETE THE COMMUNICATION. THANK YOU.

4/9/2009